

# DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548

30320

FILE: B-215798

DATE: January 30, 1985

MATTER OF: MAR, Inc.

## DIGEST:

1. Protest filed after the closing date for receipt of proposals that RFP's "Conflict of Interest" provision does not provide adequate protection is untimely since it concerns a defect apparent on the face of the RFP.
2. Protest that awardee will derive a competitive advantage in future procurements from receiving proprietary data under the present contract is premature since this allegation does not concern the award under the instant solicitation.
3. Protest that awardee cannot comply with RFP's requirements concerns awardee's responsibility and will not be considered absent circumstances not present in this case.
4. Agency's cost realism analysis is proper where agency demonstrates that its analysis was reasonable and protester fails to dispute agency's explanation. Further, no buy-in has occurred where agency has conducted a proper cost realism analysis.

MAR, Inc., protests the award of a contract to Gould, Inc., under Department of the Navy request for proposals (RFP) No. N00140-83-R-BA74. MAR basically alleges that the contract award to Gould results in an organizational conflict of interest, and that the Navy failed to evaluate Gould's proposal for cost realism.

The protest is dismissed in part and denied in part.

The RFP requested offers to perform scientific, engineering, analytical, technical and prototype-fabrication

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services in support of naval weapons systems. The RFP provided that a level-of-effort, cost-plus-fixed-fee contract would be awarded. Prior to issuing the RFP, the contracting officer recognized that a potential organizational conflict of interest existed because contract performance might require the successful offeror to review proprietary data of hardware producers under existing contracts with the Navy. To protect the owners of the data, the contracting officer obtained approval to include in the RFP, pursuant to the Defense Acquisition Regulation (DAR), appendix "G," rule 4, the following clauses:

"ORGANIZATION CONFLICT OF INTEREST (RULE 4)

(a) The contractor agrees to execute agreements with companies furnishing proprietary data in connection with work performed under this contract, obligating the contractor to protect such data from unauthorized use or disclosure so long as such data remains proprietary, and to furnish copies of such agreements to the Contracting Officer. Contractor further agrees that such proprietary data shall not be used in performing for the Department of Defense additional work in the same field as work performed under this contract if such additional work is procured competitively.

(b) For the purpose of this clause, the term 'Contractor' means the contractor, its subsidiaries and affiliates, joint ventures involving the contractor, any entity with which the contractor may hereafter merge or affiliate, and any other successor or assignee of the contractor."

"NOTICE OF ORGANIZATIONAL CONFLICT OF INTEREST CLAUSE

This solicitation contains a clause on Organizational Conflict of Interest which is to appear in any contract awarded hereunder. The language of the clause and the application of the appendix to this procurement are, however, subject to negotiation prior to submission of best and final offers."

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After the initial proposals were evaluated for technical acceptability and cost realism, the Navy requested best and final offers for evaluation. The contracting officer determined that all the best and final proposals were technically equal and decided to award the contract to Gould, whose cost offer of \$2,229,558 was approximately \$1 million less than MAR's second low cost proposal.

#### Conflict of Interest

MAR protests that the contract award to Gould results in an organizational conflict of interest and will adversely affect Gould's ability to perform the contract. MAR notes that Gould is a major hardware producer, and that the services requested by the RFP will require Gould to review proprietary data of other hardware producers. MAR reasons that because Gould allegedly represents a competitive threat to these data holders, they will not enter into the agreements with Gould provided for by the RFP conflict of interest provision and that, even if they enter into such agreements, they will not fully cooperate with Gould. MAR asserts that this problem does not arise if it is awarded the contract because MAR, as an engineering-services firm, presents no competitive threat to the hardware producers.

The Navy replies that to the extent MAR means to protest against the adequacy of the RFP's conflict of interest provision, MAR's protest is untimely. We agree. Under our Bid Protest Procedures, a protest alleging an impropriety apparent on the face of an RFP must be filed prior to the closing date for receipt of proposals. 4 C.F.R. § 21.2(b)(1) (1984). MAR's protest that the RFP conflict of interest provision offers inadequate protection to data owners and the government concerns a defect which was apparent from the face of the RFP. See JVAN, Inc., B-202357, Aug. 28, 1981, 81-2 C.P.D. ¶ 184. Since the closing date for receipt of proposals was May 13, 1983, and MAR did not file its protest until July 13, 1984, this protest basis is untimely and will not be considered on the merits.

Concerning MAR's argument that Gould should not have been awarded the contract because of anticipated competitive advantages or conflicts of interest under future procurements, we are unaware of any legal basis for so excluding

a prospective contractor that otherwise qualifies for award. Where a prospective contractor will have access to proprietary data, applicable procurement regulations only express a policy of requiring the contractor to agree with other companies to protect their information from unauthorized use and to refrain from using the information for any other purpose than that for which it was furnished. DAR, appendix "G," rule 4. The current solicitation's organizational conflict of interest clause requires such an agreement, and whether Gould in fact complies with the RFP during contract performance is a matter of contract administration within the purview of the contracting activity and, therefore, is not for consideration by this Office. See PRI, Inc., B-210714, Mar. 26, 1984, 84-1 C.P.D. ¶ 345.

Moreover, our Bid Protest Procedures are reserved for considering whether an award or proposed award of a contract under a current solicitation complies with statutory, regulatory and other legal requirements. D.J. Findley, Inc., B-217310, Apr. 12, 1984, 84-1 C.P.D. ¶ 413. We do not consider the propriety of anticipated procurements. See Surgical Instrument Company of America, B-215026, July 25, 1984, 84-2 C.P.D. ¶ 112.

We construe MAR's argument that the data owners will not enter into agreements or cooperate with Gould as questioning Gould's ability to meet the requirements of the RFP and, thus, as a challenge to Gould's responsibility. See American Medical Instrument Corp., B-212569, et al., Jan. 23, 1984, 84-1 C.P.D. ¶ 95. Before awarding the contract to Gould, the contracting officer was required to determine that Gould was responsible; this Office will not review a protest alleging that an awardee is nonresponsible unless the protester demonstrates that the contracting officer engaged in fraud or failed to apply definitive responsibility criteria. Native American Consultants, Inc., B-212715, Jan. 23, 1984, 84-1 C.P.D. ¶ 97. Since MAR has not alleged that either of these circumstances exists here, this protest basis is dismissed.

#### Cost Proposal

MAR also protests that Gould has submitted a below-cost offer. Analyzing Gould's proposed costs of \$2,229,558 for complete performance, MAR argues that when \$110,000 for travel and \$575,000 other direct costs are subtracted, only

\$1,544,558 (or \$47,879 per staff year) is available for other expenses. Further, subtracting 55 percent of this amount to account for overhead expenses and 8 percent for general and administrative (G&A) expenses, MAR concludes that Gould is left with an average direct labor reimbursement rate of \$28,602 per staff year. Noting that the RFP requires the successful offeror to employ professional persons with advanced degrees, MAR argues that \$28,602 per staff year is not a sufficient amount of money to compensate such persons.

Based on its analysis, MAR contends that Gould either deliberately submitted a below-cost offer in order to buy into the procurement, or that Gould failed to anticipate its realistic costs, in which event the Navy should have increased Gould's proposed labor rates during the cost-realism evaluation and downgraded Gould's proposal.

In cost-reimbursement contracts, evaluated costs are a better basis than proposed costs for judging the likely cost of a contract to the government. Booz, Allen & Hamilton, B-213665, Sept. 24, 1984, 84-2 C.P.D. ¶ 329. Thus, where a cost-reimbursement contract is being awarded, the procuring agency should examine an offeror's proposed costs in sufficient depth to determine a true "should" cost estimate for the proposal. Triple A Shipyards, B-213738, July 2, 1984, 84-2 C.P.D. ¶ 4.

In fact, the present solicitation expressly provided that offerors' proposed costs would be evaluated for their realism--that is, to determine the government's projected costs under each proposal. The solicitation further provided for the evaluation of the offeror's proposed compensation for professional employees to insure that the offeror intended to pay such employees a sufficient amount. The purpose of this review was to evaluate whether the offeror will obtain and retain qualified personnel and to evaluate whether the offeror understands the nature of the work to be performed.

The Navy did analyze Gould's proposed costs utilizing input from the Defense Contract Audit Agency (DCAA) and the Naval Regional Contracting Center, Newport Detachment (NRCCD) cost-and-price analyst and based on the prior year's rates for the services requested. The contracting officer found, based on the recommendations of the NRCCD cost-and-price analyst, that Gould's proposed overhead rates for the 3 years of performance were low. However, because Gould had agreed that the Navy would not be required to reimburse

Gould for any overhead costs greater than 110 percent of the overhead costs Gould proposed, for the cost-realism analysis the contracting officer utilized Gould's proposed overhead costs plus 10 percent. Also based on the NRCCD cost-and-price analyst's recommendations, the contracting officer determined Gould's proposed G&A costs were high, but realistic.

Concerning the proposed labor rates, the contracting officer determined, based on DCAA-recommended labor rates with a 5-percent annual escalation, that the labor rates proposed by Gould were higher than the Navy anticipated Gould would incur. The DCAA derived its recommendations from the labor rates Gould actually paid in the previous year, escalated 5 percent yearly to reflect inflation. In addition, the contracting officer noted that Gould agreed to provide two additional personnel as indirect expenses subject to the low 10-percent cap. Thus, Gould's proposed labor rates actually were decreased for purposes of the cost-realism analysis.

Finally, the contracting officer considered that Gould proposed to perform for no fee. Based on these findings, the contracting officer concluded that \$2,229,558 was the realistic cost the Navy could expect to incur if Gould was awarded the contract.

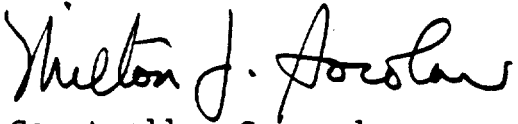
We have recognized that the evaluation of cost proposals requires the informed judgment of agency procurement personnel. Booz, Allen & Hamilton, B-213665, supra. Our review therefore is limited to determining whether the agency's cost-realism evaluation was reasonably based and not arbitrary. Robert E. Derecktor of Rhode Island, Inc., et al., B-211922, et al., Feb. 2, 1984, 84-1 C.P.D. ¶ 140. We have reviewed the Navy's evaluation (much of which has not been released to MAR) and find it to be reasonable. As specifically regards Gould's proposed labor rates, we note that the Navy's evaluation was based on the actual rates Gould paid in the previous year. We therefore find no merit in MAR's protest that the agency failed to conduct a proper cost-realism evaluation.

In conjunction with its objection to the Navy's evaluation of Gould's proposed costs, MAR also speculates that Gould might have bought into this procurement--that is, offered to perform it at a loss--in order to gain an advantage in future procurements. MAR contends that this will adversely affect Gould's ability to perform the contract. As stated previously, matters affecting a prospective contractor's ability to perform concern responsibility, and we will not review an affirmative responsibility determination

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except under limited circumstances not present here. Moreover, since we have determined that the Navy's cost-realism analysis of Gould's proposal was reasonable, the allegation of a buy-in does not present a valid basis for protest. See Bell Aerospace Co., et al., 54 Comp. Gen. 352 (1974), 74-2 C.P.D. ¶ 248.

The protest is dismissed in part and denied in part.

  
for Comptroller General  
of the United States